IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 734 OF 2006

Kamleshsingh Harnamsingh Chowhan .... Petitioner

versus

Parekh & Com[pany and ors.... Respondents.

Mr. Vivek Kantawala with Ms. Ambareen Rahed for petitioner.
Shri J.A. Udaipuri for respondents.

CORAM; P.V. KAKADE, J.

DATED; FEBRUARY 13, 2006.

P.C:

1. Heard both the sides.

2. Rule. Rule made returnable forthwith.

3. This petition is preferred against the impugned order dated 13-12-2005 passed by the trial Judge in Interim Notice No. 2111 of 2005 in R.A.E. suit No.436/721 of 2000, which reads thus:

> " I have heard both sides and gone through entire backdrop position. The matter is substantially part heard and being protracted

for nothing. It is in view of the position the production is allowed and the document is marked exhibit subject to objection as observed in AIR 2001 SC 1158. These observation made which considering sec. 3 of the Evidence Act in a protracted litigation. The authorities will be considered at the final stage."

4. It may be noted at this stage that originally respondent in the pending suit took out notice No.5731/04 requesting the trial Judge seeking permission to recall the witness and adduce additional evidence with regard to certain documents pertaining to dispute between the parties. The trial Judge after hearing both the parties was of the view that the notice was devoid of any merits. The order came to be passed to discharge the said notice as not followed by the relevant procedure of law. The learned trial Judge also observed after passing order of discharge of the notice that the matter was partheard since 4-9-2002 since after corss examination of defendant witness no.1 in October 2004 there was no further progress in the suit. In that circumstances stay was refused.

5. The record further shows that instead of moving

superior forum to bring the stay of the said order, the fresh notice for similar prayer was moved, that was interim notice no. 1788 of 2005. That notice also after hearing both the parties came to be rejected by the trial Judge, holding that the defendants were attempting to make back door entry in the suit by only request of production of this document and nothing else. It was also held that unless and until the document is proved as per the provisions of law and under the Evidence Act the same cannot be received in the evidence. Therefore, in the absence of any witness, the production of the document cannot be entertained. It was further held that if the documents were allowed to be admitted the question will again arise as to how the document would be proved before the court and the notice came to be discharged on 5-7-2005. The petitioner then took out third notice bearing No. 2111 of 2005 making similar prayer before same Judge. Surprisingly the same Judge made the impugned order viz. the matter is substantially part heard and being protreacted for nothing. Therefore the production of the said document came to be allowed and documents came to be marked as exhibit subject to objection of the other side. It is surprising by any stretch of imagination how the same Judge who had earlier rejected the notice by order dated 5-7-2005, granted the notice by a cryptic order dated 13-12-2005, who had also

discharged the first notice by a reasoned order. In my view, it is a classic case of non application of mind and failure to exercise proper jurisdiction.

6. Apart from this aspect the learned counsel for the petitioner has put reliance on the rulling of the Supreme Court in **Y.B.Patil and others Vs. Y.L.Patil reported in AIR 1977 S.C. page 392,** wherein the Apex court has dealt with the provisions of section 11 of the CPC and discussed the principles of res judicata, it shows that the ratio laid down by the Supreme Court would be squarely applicable to the present case.

7. Under the circumstances, I hold the impugned order dated 13-12-2005 which is not a reasoned order at all, is hereby set aside. Rule is made absolute. The earlier order in Interim Notice No.1788 of 2005 dated 5-7-2005 shall prevail, instead of the impugned order. The trial court is further directed to proced with the hearing of the suit on merit so as to complete the hearing within six months from the date of this order.
With this direction, the petition is hereby allowed.

8. The learned counsel for the respondent at this stage submitted that he should be given liberty to move the superior forum against the earlier orders whereby

notices came to be discharged. However with no comment on the merits and demerits of the said submission, petition is hereby disposed of with no order as to costs.

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